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No. 94-393

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

M. F. GUETERSLOH, JR.,

Petitioner

V.

THE STATE OF TEXAS; THE PUBLIC UTILITY COMMISSION; PAUL MEEK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION; THE TEXAS WATER COMMISSION; JOHN HALL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS WATER COMMISSION; DAN MORALES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF TEXAS; NORMA K. SCOGIN AND KAREN PETTIGREW, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS ASSISTANT ATTORNEYS GENERAL OF TEXAS; AND JAMES MILLER,

Respondents

REPLY TO RESPONDENTS' BRIEF WHICH WAS FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARILYN ELIZABETH PHELAN
4018 75th Street
Lubbock, Texas 79423
Telephone (806) 894-5178
Attorney for Petitioner

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M. F. GUETERSLOH, the petitioner herein, submits his reply to Respondents' Brief Filed in Opposition to Petition for Writ of Certiorari. In order that this Court not be misled, Petitioner feels that some of Respondents' allegations necessitate a response. Respondents inaccurately state (Resp. Br., p. 4) that

the "only issue raised by this petition for writ relates to the claim for just compensation against the State of Texas." The only issue in this case is whether the Eleventh Amendment is a procedural bar to a takings claim under the Fifth Amendment. Petitioner's takings claim against the State of Texas was not addressed by the Fifth Circuit because that court ruled the Eleventh Amendment barred Petitioner's suit against the state.

REPLY TO RESPONDENTS' FACT RECITATIONS

Respondents' recitations of the facts are in error as follows:

1. Respondents are correct in stating that Petitioner had a lien on a privately-owned water system when Respondents placed the system in receivership. Petitioner had sold the water system and had retained a lien on the property. Respondents make the totally false statement that the system

was in a dilapidated condition when it was sold. There is no evidence in the record nor has there ever been an issue in this case as to the state of the water system when it was sold.

2. Respondents failed to point out that, after the water system was placed in receivership, the receiver operated the system for five years, from 1983 to 1988, but paid nothing on Petitioner's note.

After Petitioner foreclosed on the water system but was enjoined by Respondent from possession of the property, Petitioner filed suit in Lubbock County against the receiver, James Miller, and the City of Lubbock. Petitioner alleged in his first original petition that the defendants' acts constituted "a taking" of his property for a public use without compensation, in violation of Section 17 of Article I of the Texas Constitution and in violation of the Fifth

and Fourteenth Amendments to the United States Constitution." Respondents did intervene in that proceeding, but a month prior to filing its Plea in Intervention, a district court in Travis County, Texas, entered a temporary injunction against Petitioner and his attorney, preventing both of them access to the water system "and from interfering with receiver's right of possession." Respondents sought the injunction because Petitioner had foreclosed on the property under his lien. Respondents then sought to prevent Petitioner access to his property even though there had never been any complaints filed against Petitioner when Petitioner had operated the water system. Respondents contend that attorneys representing the state notified Petitioner and suggested that he intervene in the receivership and that his failure to do so precludes him from filing an inverse

condemnation suit against the state. Respondents obtained an injunction against Petitioner preventing him from interfering in any manner with the receivership. Consequently, Petitioner would hardly pursue intervention as a means of reacquiring his property.

Petitioner then filed an amended complaint in his inverse condemnation suit and joined the Texas Public Utility Commission and the Texas Water Commission as defendants. In his amended complaint, he alleged a taking only under Section 17 of Article I of the Texas Constitution. Petitioner abandoned his takings claim under the Fifth and Fourteenth Amendments because this Court held, in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985), that just compensation claims under the Fifth and Fourteenth Amendments of the United States Constitution are not ripe

for review until a property owner has unsuccessfully sought compensation from the state.

3. The water system remained in receivership until 1988 when the City of Lubbock successfully completed a water system for the Carlisle area. The City, in fact, requested Respondent, the Texas Water Commission (which preceded the Texas Public Utility Commission), to continue the receivership of Petitioner's water supply until it could complete its water system to service the residents of the Carlisle addition. All the former customers of Petitioner had become customers of the City. Thus, when Respondents returned the water system to Petitioner, the system was worthless.

4. Respondents are in error in stating Petitioner offered no proof in the summary judgment proceeding. Petitioner clearly claimed title to the property. He

had not claimed title to the property prior to the foreclosure because, prior to his foreclosure, he was only a lienholder. It is obvious that Petitioner presented proof at the hearing because the district court did not grant the PUC's motion for summary judgment. The district court in Lubbock County denied the PUC's motion and then transferred the case to Travis County.

The State of Texas, the PUC and the Texas Water Commission filed a motion for summary judgment and a plea to the jurisdiction in the district court in Travis County, contending that the district court did not have jurisdiction because the suit was allegedly barred by the doctrine of sovereign immunity. The State of Texas filed a plea to the court's jurisdiction, contending the suit was barred by the doctrine of sovereign immunity even though the Supreme Court of

Texas had ruled, in Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) that the Texas Constitution authorizes compensation for the destruction of property and that the authorization is a waiver of governmental immunity. Petitioner filed an answer to the state's motion for summary judgment and plea to the jurisdiction and represented himself pro se at the hearing in the district court in Travis County on Respondents' motions. The court granted the summary judgment.

The Court of Appeals affirmed, ruling that the state's taking of Petitioner's property was a valid exercise of the state's police power, an issue that was not raised in the district court. The Court of Appeal ruled that a state agency may take an individual's property without paying the individual just compensation so long as the taking represents any form of

exercise of the state's police power. The Court of Appeals did not condition its ruling upon a requirement that the trial court make findings as to the extent of, or the circumstances surrounding, the taking. The Court of Appeals also ruled that the state proved as a matter of law that its taking of Petitioner's property was a valid exercise of its police power, even though the state contended, for the first time on appeal, that its taking was a valid exercise of its police power. This was not an issue in the trial court.

The Court of Appeals stated on page 7 of its opinion: "As a matter of law the summary judgment evidence negated any action for inverse condemnation because the Commission's authority to seek a receivership against this utility was a valid exercise of the state's police power, rather than a 'taking.'" Although the Court of Appeals recognized that the

district court entered a summary judgment for the PUC and the State of Texas, it determined that "evidence" in the summary judgment hearing negated any action for inverse condemnation.

Petitioner filed a writ of error to the Texas Supreme Court, which was denied.

Having exhausted all state remedies, Petitioner filed a takings claim under the Fifth and Fourteenth Amendments to the U. S. Constitution in the U. S. District Court for the Western District of Texas, Austin Division. The District Court's ruling that Petitioner's claim is barred by the Eleventh Amendment was affirmed by the Fifth Circuit Court of Appeals.

REPLY TO RESPONDENTS' CONCLUSIONS OF LAW

Respondents requested that the Court of Appeals for the Fifth Circuit publish its opinion in this case, because its opinion "addressed concerns and discussed legal issues of significant public

interest." Respondents now contend that this Court should deny certiorari because "federal jurisprudence would be better served by letting this issue percolate further in the circuits." (Resp. Br., p. 6) If this Court does not reverse the ruling of the Fifth Circuit that the Eleventh Amendment is a procedural bar to a takings claim against the state, it would be the State of Texas, rather than "federal jurisprudence," that would be better served. The State of Texas could continue to ignore the just compensation mandate of the Fifth and Fourteenth Amendments.

Respondents state that Petitioner has an adequate remedy in the Texas state courts even though Petitioner was never permitted to present his claim in the state courts. Respondents contend that "success" in a state takings claim is not equated with "an adequate and available

state remedy." Petitioner's lack of success does equate, however, with his failure to receive just compensation from the state.

Respondents also contend that Petitioner should have intervened in the receivership proceeding and his "lack of diligence in seeking relief under state remedial procedures" (Resp. Br., p. 7) indicates he has not exhausted "the available and adequate state remedies afforded to him by the State of Texas." Respondents do not present any authority for their novel position, that there is a procedural prerequisite to a property owner's filing of an inverse condemnation suit. It is axiomatic that when a state takes private property for a public use and does not pay the property owner just compensation, the property owner's recourse is an inverse condemnation suit. [See Brazos River Authority v. City of

Graham, 354 S.W.2d 99, 104 (Tex. 1961).] Typical of the state's continuing hostility toward the constitutional mandate, Respondents are attempting to erect a procedural prerequisite to Petitioner's right even to file initially an inverse condemnation suit. In Lucas v. So. Carolina Coastal Council, 112 S.Ct. 2886, 2891 (1993), the Supreme Court ruled that the petitioner in that case, Lucas, was not required to pursue a "special permit" procedure available to him before his takings claim was considered ripe. Petitioner in this case was not required to perform a useless act by intervening in a receivership which had already conclusively denied him access to his property.

This Court ruled in Williamson County Regional Planning Commission, 473 U.S. at 194, that a Fifth Amendment claim is premature until the state finally and

ultimately refuses to pay a property owner. Contrary to Respondents' statement that "neither success nor a claimed inadequacy of an award rise to the level of a constitutional question," it is precisely the lack of success or the claimed inadequacy of an award (in this case the award being zero) that gives rise to a Fifth Amendment takings claim.

Respondents present a novel test which they contend applies to a takings claim under the Fifth Amendment. According to Respondents (Resp. Br., p. 8):

> The test for an available and adequate state procedure for seeking just compensation begins with the presumption the state procedure implemented is fair. A plaintiff then carries the burden of establishing that the state law unquestionably would afford him no remedy.

The Fifth Amendment has no such test. The Fifth Amendment provides in simple terms that private property may not be taken "for public use, without just

compensation." The Fourteenth Amendment states unequivocally that a state may not deprive any person of "life, liberty, or property, without due process of law." A property owner has no burden to establish that "the state law unquestionably would afford him no remedy." The test for whether a property owner has a Fifth and Fourteenth Amendments takings claim is whether a state took the owner's property for a public use and refused to pay the owner just compensation. There are no other prerequisites. The State, through its attorneys and through its court system, has, in effect, itself demonstrated that the property owner has no remedy in the state. Respondents contend that the Texas Constitution compensates for regulatory takings as liberally as does the federal constitution. Whether or not this is the case, the State did not follow the Texas

constitutional requirement that Petitioner be paid for the state's taking of his property. The Texas courts may be open to takings claims, but they denied Petitioner even the right to present his claim by granting the state's motion for summary judgment. When Petitioner pursued his claim further by filing an appeal to the state court of appeals and then to the state supreme court, Petitioner exhausted his state remedies. His Fifth Amendment takings claim is now ripe. The Fifth Circuit should not be permitted to institute a procedural roadblock by granting the states immunity from such suits.

Respondents state (Resp. Br., p. 10) that the "question of whether compensation is required is a question of fact that, in this case, has been decided under the Texas Constitution." (Emphasis added.) This is an interesting conclusion given

the fact that the state district court granted the state summary judgment.

In Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893), this Court declared that the takings clause "reaches back" of all "unalienable rights" set out in the first ten amendments to the Constitution. This Court recognized in Monogahela that the first ten amendments

> are in the nature of a bill of rights and were adopted in order to quiet the apprehension of many that without some declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights. (Id. at 324)

This Court asserted that this "natural equity" was incident to the government's exercise of its power of eminent domain. According to this Court in Monogahela, "the one is so inseparably connected with the other that they may be said to exist,

not as separate and distinct principles, but as parts of one and the same principle." (Id. at 325) It is inconceivable how rights guaranteed to U. S. citizens through the bill of rights set out in the first ten amendments to the Constitution can be taken away by a procedural bar enacted in the form of a later, Eleventh Amendment.

In Dolan v. City of Tigard, 129 L.Ed.2d 304 (1994), this Court recognized the status of the Fifth Amendment as a part of the Bill of Rights. This Court stated in Dolan:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation...

If the ruling of the Court of Appeals for the Fifth Circuit is not reversed, the

Fifth Amendment will be relegated to the status of a poor relation because any Fifth Amendment claim against a state will be procedurally barred.

CONCLUSION

The issue in this case is not whether Texas courts are open to takings claims. The issue is whether the Eleventh Amendment can preclude a Fifth Amendment takings claim in a federal court.

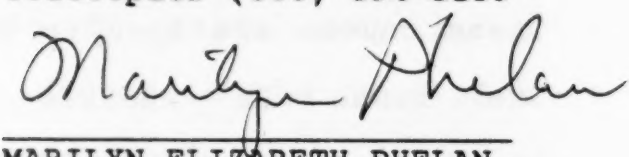
A state should not be permitted to avoid the constitutional mandate of just compensation by a procedural bar.

This Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit and remand the case for consideration of whether the State of Texas did, in fact, take

Petitioner's property without just compensation.

Respectfully submitted,

MARILYN ELIZABETH PHELAN
State Bar No. 15902000
4018 75th Street
Lubbock, Texas 79423
Telephone (806) 894-5178
Telecopier (806) 894-5259



MARILYN ELIZABETH PHELAN
Attorney for Petitioner